Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

ROBERT A. LEVY and PHYLLIS B. LEVY,

Petitioners,

vs.

SWIFT TRANSPORTATION COMPANY
(Sparks, Nevada), et al.,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New Mexico

PETITION FOR WRIT OF CERTIORARI

Robert A. Levy
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29 pp

QUESTION PRESENTED

In a case dismissed because of the running of the statute of limitations, may a State tolling provision which is inapplicable on the given facts nevertheless prevent a litigant from relying upon the federal tolling provision 28 U.S.C. §1367(d), thereby nullifying the federal statute?

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Swift Transportation Company (Phoenix, Arizona), Jerry C. Moyes, Keith Dale Nichols, and Eddie Lee Tiggs, were parties before the Court of Appeals.

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Petitioners, Robert A. Levy and Phyllis B. Levy, respectfully request that a writ of certiorari be issued to review the judgment of the Court of Appeals of the State of New Mexico in this case.

OPINIONS BELOW

The Memorandum Opinion of the Court of Appeals of New Mexico appears at Appendix A to this petition and is unpublished. The Judgment of the Third Judicial District Court of New Mexico in Levy v Swift et al., No. CV-99-90, dismissing plaintiffs' complaint appears at Appendix B of this petition and is unpublished.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals of the State of New Mexico ("Court of Appeals") was entered on November 15, 2001(App.A). The Supreme Court of New Mexico denied a timely petition for writ of certiorari on February 12, 2002 (App.D).

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

STATUTORY PROVISIONS INVOLVED

The Supplemental Jurisdiction statute 28 U.S.C. §1367 provides in relevant part:

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other

claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under article III of the United states constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

The New Mexico savings statute, NMSA 1978 §37-1-14 (1880) states as follows:

If, after the commencement of an action, the plaintiff fail therein for any cause, except negligence in its prosecution, and a new suit be commenced within six months thereafter, the second suit shall, for the purposes herein contemplated, be deemed a continuation of the first.

STATEMENT OF THE CASE

The question in this Petition is whether or not a State tolling statute can be used to prevent the application of a federal tolling statute to petitioners' (the Levys) lawsuit, when the State statute is inapplicable to the facts of the case.

This case has had a lengthy and varied trip through the federal and state (New Mexico) judicial systems, including a prior Petition for Writ of Certiorari to this Court [99-1356, 529 U.S.1055 4/3/2000)]. Plaintiffs filed cause CIV-97-0777 (*"Levy I"*) in the United States District Court for the District of

New Mexico on June 6, 1997, alleging personal injuries and property damages arising out of an automobile accident that occurred in Grant County, New Mexico on July 20, 1994. *Levy I* was dismissed on April 28, 1998 for want of federal jurisdiction. Less than a month later, on May 15, 1998, Plaintiffs filed a second lawsuit in federal court, cause number CIV-98-578 ("*Levy II*"), which they amended on May 22, 1998, to include invocations of the federal and state savings statutes, 28 U.S.C. §1367(d) and NMSA §37-1-14 respectively. In motions to dismiss, defendants argued that the savings statutes were inapplicable and that the case was barred by the applicable statutes of limitations. *Levy II* was dismissed on December 30, 1998, without prejudice, on grounds that none of the federal claims were viable, as a result of which the federal courts lacked subject matter jurisdiction. After unsuccessfully moving under Rule 59 to amend the judgment, plaintiffs appealed unsuccessfully to the United States Court of Appeals for the Tenth Circuit, No. 99-2167, 194 F 3d 1320, and to the Supreme Court of the United States, 529 U.S.1055. The present lawsuit ("*Levy III*") was filed in the third judicial district court of New Mexico, number CV-99-90, on January 28, 1999, invoking the federal and State Savings statutes: "Plaintiffs claim jurisdiction of this Court over the instant action under 28 U.S.C. §1367(d), and as a continuation of the prior cases pursuant to NMSA 1978 §37-1-14"(R.P.2).[1] On joint motion for summary judgment, defendants argued that "§1367(d) does not apply if 'state law provides a longer tolling period.' As Plaintiffs admit, NMSA 1978 §37-1-14 provides a six-month tolling period, five months longer than §1367(d). Accordingly, the federal statute is inapplicable by its own terms"(R.P.624) The Levys argued

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[1]Citations to "R.P." refer to the Record Proper from the District Court.

that if the state provision were inapplicable, its tolling period would be zero days, thereby leaving the federal statute applicable, invoking the supremacy clause of the U.S. Constitution (R.P.697). Without discussion, Judge Robles dismissed *Levy III* on grounds that Plaintiffs' claims were time-barred (App.B).

The Levys appealed the summary judgment to the Court of Appeals. Their Docketing Statement included the following:

> "The following issues are presented by the Levys in this appeal: A. Whether the trial court erred by holding that the federal saving statute, 28 USC 1367(d), did not toll the statute of limitations during the pendency of *Levy I* and *Levy II*. This issue was raised in the Levys' complaint, in their answer to the motion for summary judgment, in their supplemental brief, and by reference in the motion for reconsideration."

The parties reiterated their arguments in the briefs on appeal, and on November 15, 2001, the Court of Appeals affirmed the summary judgment of the district court on grounds that "since the New Mexico savings statute provides a six-month period in which to sue, whereas the federal statute provides only thirty days, the federal statute does not by its own terms apply" (App.A at 5a), and also finding that the State savings statute was inapplicable (App.A at 7a).[2] The Levys' motion for rehearing in the Court of Appeals and petition for

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[2]In light of its disposition, the Court did not address the remainder of the parties' arguments (App. A at 8a).

writ of certiorari to the Supreme Court of New Mexico were denied, the latter on February 12, 2002.

REASON FOR GRANTING THE WRIT

THE PETITION SHOULD BE GRANTED BECAUSE THE ORDER AND JUDGMENT OF THE NEW MEXICO COURT OF APPEALS NULLIFIES THE FEDERAL TOLLING STATUTE, 28 U.S.C. § 1367(d).

In 1990, the U.S. Congress enacted legislation establishing the Supplemental Jurisdiction statute, 28 U.S.C. §1367, which codified the doctrines of pendent, ancillary, and supplemental jurisdiction and gave federal courts jurisdiction over claims which they otherwise might not have had. Subsection (c) of this statute gave the federal courts discretion to decline supplemental jurisdiction over such claims in certain circumstances. In the event that a claim is declined pursuant to Subsection (c), Subsection (d) of this statute provides for tolling the statutes of limitations on the claim so that it will not be time barred when refiled:

"(d) The period of limitations.....shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period" (Emphasis supplied).

The issue here is the significance of the clause "unless State law provides for a longer tolling period." ("the duration clause"). The Levys believe this issue is a matter of first impression for this Court.

The simple grammatical sense of Subsection (d) is that a litigant has at least 30 days to refile, the exact time depending

on whether or not a State tolling statute provides more than 30 days. There is no indication that Congress intended any other construction. See Practice Commentary to 28 U.S.C. §1367 by David D. Siegel, Codifying "Supplemental" Jurisdiction.

In affirming the summary judgment in this case, the Court of Appeals construed the duration clause to mean something quite different, namely that States with savings statutes providing a tolling period of more than 30 days are exempt from application of federal provision § 1367(d), particularly when the State provision is inapplicable to the facts of the given case. **So that even when a plaintiff refiles his claims within the 30-day post dismissal period provided by§1367(d), it is the applicability of the state statute which determines whether or not the claims are time barred.**

When the Levys filed *Levy III* twenty-nine days after *Levy II* was dismissed, they invoked the New Mexico savings statute §37-1-14 and the federal tolling statute 28 U.S.C. §1367(d) to toll the applicable statutes of limitations. The Court of Appeals held that § 37-1-14 was inapplicable to benefit *Levy III* because *Levy II* had been filed in federal court instead of state court, such a mistake constituting negligence in prosecution, making §37-1-14 inapplicable (App. A at 7a).

The Court of Appeals also held that the federal tolling statute 28 U.S.C. §1367(d) was inapplicable: "Since the New Mexico savings statute provides a six-month period in which to sue, whereas the federal statute provides only thirty days, thefederal statute does not by its own terms apply" (App.A, at

5a).[3] Since both the federal and state savings statutes were inapplicable, *Levy III* was barred by the pertinent statutes of limitations because it was filed more than four years after the cause of action accrued, and the summary judgment of the district court was affirmed.

This holding by the court of appeals amounts to nullification of the federal tolling statute 28 U.S.C. §1367(d). Such nullification is a flagrant violation of the supremacy clause of the U.S. Constitution, Const. Art. VI, and must be reversed by this Court, *M'Culloch v. Maryland*, Md.1819, 17 U.S. 406, 4 Wheat. 406, 4 L.Ed.579. Otherwise, State governments will be able to control the application of federal law, in direct violation of a basic precept of the Constitution of the United States.

An example is the situation in the State of Georgia. There the state savings statute has a tolling period of six months, similar to New Mexico. However, in Georgia the case law has held that the savings statute does not apply to cases dismissed for lack of jurisdiction [See Lillibridge v. Riley, 316 F 2d 232,233 (Fifth Cir. 1963)] The federal tolling statute §1367(d)was enacted to cover just such cases, namely those

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[3]Before the appeal was briefed, the Court of Appeals issued a Calendar Notice of a proposed summary disposition, proposing to hold that §1367(d) **did apply** for the benefit of *Levy III*, and that "if defendants wish to argue [as they did in the district court] that § 1367(d) is inapplicable because state law provides a longer tolling period, Defendants should direct this Court to some authority for the proposition that a state tolling provision which is inapplicable on the given facts may nevertheless prevent a litigant from relying upon the federal tolling provision"(bracketed clause supplied). Defendants failed to produce any such authority in the briefs subsequently filed.

dismissed for lack of jurisdiction. But because the state statute has a longer tolling period and cases dismissed for lack of jurisdiction are not covered, the federal statute would thus be nullified in that jurisdiction, according to the Court of Appeals.

On the other hand, in the State of California the legislature has decided not to have a savings statute. There §1367(d) would apply without restriction. Thus, according to the Court of Appeals, §1367(d) would apply in States with no tolling statute but not in States with a tolling provision. By adopting a restrictive tolling statute, a State such as California could take away a right provided to its citizens by federal law.

The Court of Appeals' holding violates the principle that "Statutes as well as other writings are to be read and understood primarily according to their grammatical sense, unless it is apparent that the author intended something different," *In re Goldsworthy's Estate*, 115 P 2d 627,631(N.Mex. 1941), quoting Sutherland on Statutory Construction.

The construction adopted by the Court of Appeals violates the doctrine of the "last antecedent", which says that "qualifying words, phrases, and clauses are to be applied to the words or phrase immediately preceding, and are not to be construed as extending to or including others more remote," *Elliot Coal Min. v. Dir., Office of Wkrs. Comp*, 17 F 3d 616,629 (3rd Cir.1994).[4] The absence of a comma or other punctuation before the coordinate conjunction "unless" confirms that the

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[4]The last antecedent doctrine goes back a long way, *Wood v. Baldwin*, 10 NYS 195,196 (1890): "The rule of grammar, which is also a rule of law, is that a relative clause relates to the nearest antecedent that will make sense. The rule is as ancient as the language," citing cases as far back as Edward IV.

duration clause modifies only the phrase immediately preceding, *Elliot* at 630. Application of the "mischief rule", *Elliot* at 631, is further confirmation.

Reading §1367(d) in the light of the last antecedent rule, the duration clause "unless State law provides for a longer tolling period" applies only to the phrase "for a period of 30 days after it is dismissed" and not to the preceding language, thereby affecting the duration but not the existence of the tolling period.[5]

The duration clause is meant to give the litigant at least a 30-day period to refile, not to deny him that right in certain States, such as Georgia, or in this instance, New Mexico. It is an enlarging clause, not a restricting clause.

Therefore when a plaintiff refiles his claims within 30 days after dismissal, the applicable statutes of limitations are tolled by §1367(d), regardless of the existence or applicability of a state tolling provision.

Since *Levy III* was filed less than 30 days after *Levy II* was dismissed, §1367(d) should be applied for the benefit of the *Levy III* lawsuit, such that the limitations period was tolled during the pendency of *Levy II*. Therefore, the decision of the Court of Appeals should be reversed and the case remanded for further proceedings consistent with the findings of this Court.

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[5]Even assuming *arguendo* that the duration clause applies to the entire statute as held by the Court of Appeals, if as here the state tolling provision is inapplicable to the facts of the case, then the "State law" does not "provide for a longer tolling period;" it provides no tolling period whatsoever, and § 1367(d) thus applies anyway.

CONCLUSION

Simply put, the issue presented by this case--can a State nullify a federal statute, cannot be disregarded. Aside from the serious consequences to the Levys in being denied the ability to pursue their claims, the consequences for the relationship between the States and the federal government are too drastic to contemplate. By granting the Levys' petition for writ of certiorari, this Court can correct the Court of Appeals' ill-advised decision, which nullifies an important federal statute by means of faulty statutory construction.

Accordingly, the Levys respectfully request that their petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A - JUDGMENT OF THE COURT OF APPEALS OF THE STATE OF NEW MEXICO FILED NOVEMBER 15, 2001

Appeal No. **21,501**
Dona Ana County **CV 99-90**

ROBERT A. LEVY and PHYLLIS B. LEVY
Plaintiffs-Appellants,

vs.

SWIFT TRANSPORTATION COMPANY, et al.,
Defendants-Appellees

APPEAL FROM THE DISTRICT COURT OF DONA ANA COUNTY
Robert E. Robles, District Judge

MEMORANDUM OPINION

ARMIJO, Judge.

Plaintiffs appeal the district court's order granting summary judgment to Defendants on the grounds that Plaintiffs' action was barred by the applicable statute of limitations. Plaintiffs raise several arguments on appeal, contending that the district court erred in refusing to apply our federal and state saving statutes to bring Plaintiffs' claims within the applicable limitation periods. For the reasons that follow, we affirm the district court's decision to dismiss Plaintiffs' complaint.

BACKGROUND

This appeal arises from Plaintiffs' failed attempt to file a lawsuit in federal court to recover damages allegedly caused by an automobile accident, occurring on July 20, 1994. Almost three years after the accident, on June 6, 1997, Plaintiffs filed a complaint in federal court against the same parties named in this action, seeking to recover for personal injuries and property damages sustained in the accident. See Levy v. Swift Transp.Co., No. CIV97-0777HB/JHG (D.N.M. June6,1997)(Levy I). Plaintiffs subsequently moved to amend their federal complaint to add the Central Intelligence Agency (CIA) as a defendant, alleging that the CIA conspired with the other Defendants to kill or injure Plaintiffs by tracking and following Plaintiffs in their vehicle, which allegedly culminated in the automobile accident and further alleging that the CIA had been engaged in a continuing conspiracy against Plaintiffs since 1961. Defendants moved to dismiss Plaintiffs' federal complaint for lack of subject matter jurisdiction and the federal district court agreed that Plaintiffs' complaint should be dismissed for failure to establish diversity jurisdiction. The federal district court also denied Plaintiffs' motion to amend the complaint to add the CIA as a defendant as a futile attempt to establish federal jurisdiction because Plaintiffs' proposed claims against the CIA could not survive a motion to dismiss, or motion for summary judgment. Accordingly, the court dismissed Levy I without prejudice.

Less than one month after the dismissal of Levy I, Plaintiffs filed a second lawsuit in federal court. See Levy v. Swift Transp. Co., No. CIV 98-578 LH/WWD (D.N.M. May 22,1998)(Levy II). In its memorandum opinion and order ruling on motions to dismiss Levy II, the federal district court noted that the complaint filed in Levy II was "substantially the

same as the proposed complaint that [the court] refused to allow Plaintiffs to file in [Levy I]." After reviewing the claims in the Levy II complaint, the federal district court concluded that the claims against the CIA and United States should be dismissed. Without these defendants as parties to the lawsuit, the court further concluded that it lacked subject matter jurisdiction because Plaintiffs had again failed to establish diversity jurisdiction. The court therefore dismissed Levy II without prejudice. In addition to again dismissing Plaintiffs' complaint, the federal court sua sponte issued a memorandum opinion and order barring Plaintiffs from filing any further actions in that court against the same named defendants and relating to the same subject matter. The court described Plaintiffs' actions in Levy II as "an abuse of process," concluding that Plaintiffs had in effect engaged in frivolous and vexatious tactics intended to circumvent the court's ruling in Levy I by filing substantially the same disallowed complaint under a new docket number. Accordingly, the court in Levy II ruled that restrictions on Plaintiffs' right to file future pleadings in federal court were "warranted, given the frivolous and vexatious nature of [Plaintiffs'] pleadings...."

While Plaintiffs were unsuccessfully appealing Levy II to the United States Court of Appeals for the Tenth Circuit and the United States Supreme Court, Plaintiffs also filed a substantially similar complaint (absent the federal government defendants who Plaintiffs tried to sue in federal court) in New Mexico state district court on January 28, 1999, which is the subject of this appeal--Levy III. Defendants moved for summary judgment, arguing that Plaintiffs' claims were barred by the applicable statutes of limitation because Plaintiffs' personal injury claims were not initiated in state court within three years of the accident and because Plaintiffs' property damage claims were not initiated in state court within four years

of the accident. See NMSA 1978 §§ 37-1-8 (1976) (action for personal injury must be brought within three years of accrual of cause of action) and -4 (1880)(action for property damage must be brought within four years of accrual of cause of action). The court concluded that Plaintiffs' claims were barred by the pertinent statutes of limitation and granted Defendants' motion for summary judgment. Plaintiffs now appeal.

DISCUSSION

Although Plaintiffs did not file their complaint in state district court until more than four and one-half years after the automobile accident, Plaintiffs argue that the district court erred by granting summary judgment based on the three-year statute of limitations for personal injury claims and four-year statute of limitations for property damage claims. In particular, Plaintiffs contend that the court should have applied our state and federal savings statutes to toll the applicable statutes of limitation. See NMSA 1978 §37-1-14 (1880) (New Mexico Savings Statute); 28 U.S.C. 1367(d) (federal savings statute). Since Plaintiffs filed Levy I in federal court within three years of the automobile accident, Plaintiffs maintain that their personal injury and property damage claims were timely filed in state district court. We review the district court's decision to grant summary judgment de novo on appeal. See Hasse Contracting Co. v. KB Fin., Inc., 1999-NCSC-023, ¶ 9, 127 N.M. 316, 980 P.2d 641. "Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." Self v. United Parcel Serv., Inc., 1998-NCSC-046, ¶6, 126 N.M. 396, 970 P.2d 582.

Plaintiffs maintain that their claims are not barred by the applicable statute of limitations because the lawsuit is encompassed within the New Mexico Savings Statute. Since

the New Mexico savings statute provides a six-month period in which to sue, whereas the federal statute provides only thirty days, the federal statute does not by its own terms apply. Additionally, for the reasons that follow concerning jurisdiction, it did not appear that the federal court ever had jurisdiction. Thus, we concentrate on the state statute. Section 37-1-14 provides:

> If, after the commencement of an action, the plaintiff fail[s] therein for any cause, except negligence in its prosecution, and a new suit be commenced within six months thereafter, the second suit shall, for the purposes herein contemplated, be deemed a continuation of the first.

However, for the reasons that follow, we conclude that the New Mexico Savings Statute does not apply under the undisputed facts of this case.

As noted above, the complaint in Levy I was dismissed for lack of subject matter jurisdiction and Plaintiffs were not allowed to file a proposed amended complaint because the proposed amendment was a futile attempt to establish federal jurisdiction by joining the federal government as a defendant based on proposed claims that would not survive a motion to dismiss, or motion for summary judgment. Despite this clear ruling in Levy I, Plaintiffs persisted in filing substantially the same proposed amended complaint as a new original complaint under a new docket number in Levy II. The court in Levy II predictably dismissed the claims asserted against the federal government and dismissed the remaining claims against the non-governmental defendants for lack of subject matter jurisdiction. In so doing, the court in Levy II characterized

Plaintiffs' actions as "an abuse of process" and "frivolous and vexatious tactics" that warranted the prohibition of further federal court filings by Plaintiffs involving the same defendants and subject matter.

Under the express terms of Section 37-1-14, the New Mexico Savings Statute does not apply to a cause of action that fails because of "negligence in [its] prosecution." Plaintiffs suggest that negligence in prosecution only involves a failure to move a case along. However, in Barbeau v. Hoppenrath, 2001-NMCA-077, ¶ 12, Vol.40, No.44,SBB 19, this Court declined to limit "negligence in its prosecution" to cases in which the lawsuit is filed, but not prosecuted. Instead, we held that Section 37-1-14 "is intended to protect those who prosecute their action in a non-negligent manner; the plaintiff must choose a forum that arguably has the power to decide the matter involved." Id. ¶ 15. In Barbeau, the plaintiffs filed their first complaint in federal court shortly before the statute of limitations was about to expire. Id. ¶ 16. The complaint on its face defeated subject matter jurisdiction and later the plaintiffs also conceded in federal court that there was no personal jurisdiction. Id. ¶ 4. Based on those circumstances, we stated in Barbeau that the Plaintiffs "made no showing that the filing in Oregon federal court was an innocent mistake or an erroneous guess at an elusive jurisdictional fact known only to the defendants or any other circumstance that might serve to excuse what otherwise appears clearly to be negligence." Id. ¶16. Accordingly, we concluded that the New Mexico Savings Statute was inapplicable because there was negligence in prosecution as a matter of law. Id. ¶ 17. In light of our decision in Barbeau, we believe the same result is warranted in this case.

Even though Plaintiffs were plainly advised in Levy I that their complaint and proposed amended complaint failed to

establish subject matter jurisdiction, Plaintiffs inexplicably proceeded to file yet another substantially similar complaint in the same federal court. Indeed, because there was no reasonable explanation for Plaintiffs' actions, the federal court in Levy II prohibited Plaintiffs from filing similar pleadings in the future because of their "abuse of process" and "frivolous and vexatious tactics." See Barbeau, 2001-NMCA-077, ¶ 4 (noting that federal magistrate found that plaintiffs' counsel was not diligent in the case). In short, under the undisputed facts of this case, we find no basis for concluding that Plaintiffs' decision to pursue Levy II "was an innocent mistake or an erroneous guess at an elusive jurisdictional fact." nor have plaintiffs suggested any other circumstance to excuse what we believe was obvious negligence in the prosecution of Plaintiffs' claims against Defendants. Therefore, we hold that the New Mexico Savings Statute cannot be applied to toll the applicable statutes of limitations in this case.

Plaintiffs seem to suggest that they are still entitled to the protection of the New Mexico Savings Statute because even if there was negligence in the prosecution of Levy II, there has been no showing of negligence in the prosecution of Levy I. Even assuming that the New Mexico State Savings Statute could be applied to toll the running of the applicable statute of limitations from Levy I, the tolling period would only extend for a period of six months under the express terms of Section 37-1-14. However, Levy III was not filed until January 28, 1999, which was approximately eight months after Levy I was dismissed on April 28, 1998. Thus, even if Plaintiffs were given the benefit of the six-month tolling provision from the dismissal of Levy I, instead of Levy II, the six-month period would have nevertheless elapsed by the time Plaintiffs filed Levy III in state district court.

Because Levy II was dismissed without prejudice and the court stated that its "Memorandum Opinion and Order is on the merits, resolves all remaining issues and adjudicates all rights and liabilities of the parties," Plaintiffs believe that the court in Levy II necessarily determined that the state and federal savings statutes applied to Plaintiffs claims. Accordingly, Plaintiffs assert that under the doctrines of law of the case or collateral estoppel, the district court was precluded from concluding otherwise in this case. We disagree.

As noted above, in Levy II, the court dismissed the claims against the federal defendants and concluded that it lacked subject matter jurisdiction with regard to the remaining claims against the non-governmental defendants. The court's orders must be read within that context. Since the court concluded that it lacked subject matter jurisdiction to consider Plaintiffs' claims, it necessarily did not, and could not, rule on whether the federal and state savings statutes would permit Plaintiffs to pursue their claims in state court. The dismissal without prejudice in Levy II was nothing more than an acknowledgment that it lacked the jurisdiction to decide whether Plaintiffs' claims could be pursued in another jurisdiction. Despite Plaintiffs' arguments to the contrary, we find nothing in the court's orders in Levy II that can be reasonably construed as a ruling in favor of Plaintiffs on the issue of the applicability of the federal or state savings statutes.

CONCLUSION

Based on the foregoing, we affirm the district court's summary judgment order dismissing Plaintiffs' claims as barred by the applicable statutes of limitation. In light of our disposition, we need not address the remainder of the parties' arguments regarding why the federal and state saving statutes

should or should not operate to toll the statutes of limitations in this case.

IT IS SO ORDERED.

s/M.CHRISTINA ARMIJO, Judge

WE CONCUR: s/ **A. JOSEPH ALARID**, Judge

s/ **LYNN PICKARD**, Judge

APPENDIX B - JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT OF NEW MEXICO FILED MAY 30, 2000

No. **CV-99-90**

ROBERT A. LEVY and PHYLLIS B. LEVY,
Plaintiffs,

vs.

SWIFT TRANSPORTATION COMPANY, et al.,
Defendants.

SUMMARY JUDGMENT

THE MATTER of Defendants' Joint Motion for Summary Judgment having regularly come before the Court, the Court having reviewed the Motion and all memoranda submitted by the parties in support of and opposition thereto, and being otherwise well and fully advised in the premises, FINDS:

1. The Motion is well taken and should be granted.
2. This action is barred by the pertinent statutes of limitations.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that this cause of action is hereby DISMISSED WITH PREJUDICE.

s/ **Robert E. Robles**, District Judge

APPENDIX C -ORDER DENYING REHEARING
COURT OF APPEALS OF NEW MEXICO
FILED DECEMBER 18, 2001

Appeal No. **21,501**

ROBERT A. LEVY and PHYLLIS B. LEVY,
Plaintiffs-Appellants,

vs.

SWIFT TRANSPORTATION COMPANY, et al.,
Defendants-Appellees

A. JOSEPH ALARID, Presiding Judge
LYNN PICKARD, Judge
JAMES J. WECHSLER, Judge

ORDER ON MOTION FOR REHEARING

In this cause, a motion for rehearing having been filed by Plaintiffs-Appellants, and consideration having been had by two of the members of the original panel and by a third judge who has been designated by the chief judge pursuant to Rule 12-404(B) NMRA 2001,

IT IS ORDERED that the motion for rehearing is hereby **DENIED**.

s/ **A. Joseph Alarid**, Presiding Judge

APPENDIX D - ORDER DENYING CERTIORARI SUPREME COURT OF THE STATE OF NEW MEXICO
FILED FEBRUARY 12, 2002
NO. **27,290**

ROBERT A. LEVY and PHYLLIS B. LEVY,
Plaintiffs-Petitioners,

vs.

SWIFT TRANSPORTATION COMPANY, et al.,
Defendants-Respondents.

ORDER

This matter coming on for consideration by the court upon petition for writ of certiorari, and the Court having considered said petition and responses, and being sufficiently advised, Chief Justice Patricio M. Serna, Justice Joseph F. Baca Justice Gene E. Franchini, Justice Pamela B. Minzner, and Justice Petra Jimenez Maes concurring;

NOW, THEREFORE, IT IS ORDERED that the petition for writ of certiorari is **denied** in Court of Appeal number **21501.**

IT IS SO ORDERED.

WITNESS, The Hon. Patricio M. Serna, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 12th day of February, 2002.

s/Madeline Garcia, chief Deputy Clerk

Supreme Court, U.S.
FILED
MAY 28 2002
OFFICE OF THE CLERK

No. 01-1603

IN THE

Supreme Court of the United States

ROBERT A. LEVY and PHYLLIS B. LEVY,

Petitioners,

v.

SWIFT TRANSPORTATION COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW MEXICO COURT OF APPEALS

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Swift Transportation Co. Inc., is an Arizona corporation owned by Respondent Swift Transportation Corporation, a Nevada corporation which, in turn, is wholly owned by Swift Transportation Co., Inc., a Nevada corporation which is publicly traded on NASDAQ. As of December 31, 2001, the only publicly-traded entity holding more than 10% interest in Swift Transportation Co., Inc. (Nevada), is FMR Corporation. FMR is affiliated with Fidelity Mutual Funds.

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STATEMENT OF THE CASE

A. STATEMENT OF FACTS

Petitioners state the question to be considered in this matter as whether a state's tolling statute may be used to prevent the application of the federal tolling statute to their case. Pet., p. 2. The true question is whether the statute upon which Petitioners rely, 28 U.S.C. § 1367, is even applicable to their factual situation.

B. PROCEEDINGS BELOW

This is the second time this case has been before the Federal Appellate Courts.[1] The first time involved the dismissal by the United States District Court for the District of New Mexico of Petitioners' second lawsuit against the same parties (and the United States), arising out of the same facts. Petitioners' first case had been dismissed by the United States District Court for want of jurisdiction.[2]

All three of Petitioners' lawsuits seek various damages from Respondents (and in *Levy II* also from the United States), arising out of a motor vehicle accident that occurred in New Mexico on July 20, 1994. *Levy I* was dismissed for

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1. The first time was on Petitioners' Petition for Writ of Certiorari in *Levy v. Swift Transportation Co., et al.*, 99-1356. That Petition was denied on April 3, 2000.

2. *See, Levy v. Swift Transportation Co., et al.*, Civ. 97-0777 (DNM 1997) (*Levy I*); *Levy v. Swift Transportation Co., et al.*, Civ. 98-578 (DNM 1998), *aff'd*, 194 F.3d 1320 (10th Cir. 1999), *cert. denied*, 529 U.S. 1055 (2000) (*Levy II*). The instant case is referred to by the courts and parties as *Levy III*.

want of diversity jurisdiction because the Levys and Respondent Tiggs are all residents of Texas. *Levy II* was dismissed because Petitioners failed to comply with the statute of limitations in the Federal Tort Claims Act[3] and because there was still no diversity between Petitioners and Respondent Tiggs.

It is important to note that in dismissing *Levy II*, the district court found that Petitioners had filed essentially the same claims against the non-governmental defendants which had been dismissed in *Levy I*. The *Levy I* court had also predicted that the claims against the United States would be found fatally defective. Petitioners completely ignored these warnings when they filed *Levy II*. This behavior led the *Levy II* court to prohibit Petitioners from filing further suits against these Respondents in the Federal District of New Mexico. Memorandum Opinion and Order Barring Plaintiff [sic] From Further Filing, *Levy II*, May 14, 1999.

This procedural history is important because it forms the basis for the New Mexico Courts' decisions that, under New Mexico law[4], Petitioners had been negligent in prosecuting their case, thereby removing themselves from the protection of the state tolling statute.

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3. 28 U.S.C. § 2401(b) (FTCA hereafter).

4. NMSA 1978, § 37-1-14, the New Mexico tolling statute, reads as follows:

> If, after the commencement of an action, the plaintiff fail therein for any cause, except negligence in its prosecution, and a new suit be commenced within six months thereafter, the second suit shall, for the purposes herein contemplated, be deemed a continuation of the first.

Finally, Respondents note that Petitioners admit they unsuccessfully argued the application of the federal and state tolling statutes in *Levy II*. Pet., p. 3. Though the argument on those statutes was not precisely the same as Petitioners now present, the result is the same: Petitioners cannot place themselves within the protection of either statute.

REASONS FOR DENYING THE WRIT

I.

PETITIONERS CANNOT BRING THEMSELVES WITHIN THE PROTECTION OF THE SUPPLEMENTAL JURISDICTION STATUTE

Petitioners contend that tardy filing of their claims in state court was protected by 28 U.S.C. § 1367(d), the tolling provision of the federal supplemental jurisdiction statute. Pet., p. 5. The fatal flaw to this claim is that, under the procedural history of this case, Petitioners cannot reach the tolling provision of subsection (d).

Before Petitioners can qualify for protection under the federal tolling provision, they must cross two critical thresholds: first, they must show that the U.S. District Court had original jurisdiction over *Levy I* and *II*. 28 U.S.C. § 1367(a). Patently, that is not the case.

Levy I was dismissed for want of diversity jurisdiction. Memorandum Opinion and Order, April 28, 1998. In determining that it had no jurisdiction, the district court specifically addressed § 1367:

> No court has held in a case similar to the present one, that § 1367 permits a federal court to exercise supplemental jurisdiction over a claim against a non-diverse party where jurisdiction is predicated on diversity, and many cases have held to the contrary.

Memo. Op. & Ord., p. 7, citations omitted. The court concluded, "The entire case must be dismissed for lack of subject matter jurisdiction under the diversity and supplemental jurisdiction statute". *Ibid.*, p. 8.[5] Petitioners did not appeal dismissal of *Levy I*. Rather, they filed *Levy II* using essentially the same Complaint the *Levy I* court had said would be futile and subject to dismissal.

Levy II was dismissed on motion by the federal defendants because Petitioners' claim was time-barred under the FTCA. *Levy II*, Memo. Op. & Ord., Dec. 30, 1998, pp. 3-9. The District Court predictably dismissed the non-governmental defendants for the same lack of diversity that prevented jurisdiction from attaching in *Levy I*. *Ibid.*, pp. 9-10. The *Levy II* court found that because,

> complete diversity does not exist, the court is without a source of jurisdiction over the remaining non-federal defendants and consequently must dismiss all counts directed against them, due to a lack of subject matter jurisdiction.

Memo. Op. & Ord., p. 10.

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5. The district court then proceeded to analyze Petitioners' proposed Amended Complaint, and found that it would be futile, since it would be immediately subject to successful motions for summary judgment or to dismiss. Memo. Op. & Ord., pp. 8-11.

Dismissal of *Levy II* was affirmed by the Tenth Circuit Court of Appeals. *Levy v. Swift Transportation Co.*, 194 F.3d 1320 (10th Cir. 1999). This Court then denied certiorari. *Levy v. Swift Transportation Co.*, 529 U.S. 1055 (2000).

Accordingly, the federal courts have never had original jurisdiction over *Levy I* or *II*. Petitioners cannot cross the first threshold necessary to bring their case within the ambit of § 1367.

The second threshold barring Petitioners' entry into the realm of the savings statutes is found in 28 U.S.C. § 1367(d), itself. Under that section, a prerequisite to extending the limitations period for supplemental jurisdiction claims is that the claim has been "voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a)." There has been no voluntary dismissal in any of these proceedings.

Dismissal of the federal court cases was hotly contested. Petitioners fought hard to maintain their action in *Levy I*. They opposed Respondents' Motion to Dismiss for Lack of Jurisdiction and sought, in a separate motion, to amend their Complaint so as to create jurisdiction. The court found it had no jurisdiction, and that amending the Complaint would not cure that defect.

When Respondents moved to dismiss *Levy II*, Petitioners opposed the Motion and again unsuccessfully sought to amend their already once-amended Complaint. Failing that effort, Petitioners sought reconsideration of the dismissal under F. R. Civ. P. 59. Upon denial of that motion, Petitioners appealed to the Tenth Circuit, and having that appeal denied, unsuccessfully sought *en banc* reconsideration. Their Petition

for Writ of Certiorari to the Tenth Circuit was denied by this Court. While this case may be said to have a number of aspects, voluntary dismissal by Petitioners is not one of them.

II.

PETITIONERS MISINTERPRET THE PLAIN MEANING OF 28 U.S.C. § 1367(d)

> (d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

28 U.S.C. § 1367(d).

Petitioners, using strained logic and grammatical interpretation, attempt to redraft § 1367(d) for their benefit. In doing so, they either ignore the plain draftsmanship of the statute or attempt to relegate an important condition, "unless", to the level of a mere coordinate conjunction. Pet., p. 8. The primary rule of statutory construction is to look for the plain meaning of what has been written. *See, Crandon v. United States*, 494 U.S. 152, 158 (1990) ("In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy"); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1998) ("In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole").

Petitioners' misinterpretation begins with their attempt to use the so-called "last antecedent rule". They take the first four words of the section, eliminate a substantial amount of language,[6] and then jump to the language they want interpreted. Reading the statute this way changes the meaning Congress intended.

Petitioners emphatically argue that, " . . . when a plaintiff refiles his claims within the 30-day post-dismissal period provided by § 1367(d), it is the applicability of the state statute which determines whether or not the claims are time-barred". Pet., p. 6 (emphasis removed). They then claim that it is improper to apply the state statute, because doing so allows states to control application of federal law. *See*, Pet., p. 7.

The inaccuracy of this position is patent: The existence of a state tolling period longer than 30 days is what makes state law applicable. The timing of Petitioners' filing of their subsequent Complaint within the longer period[7] is wholly irrelevant to the analysis under § 1367(d).

The plain meaning of § 1367(d) is that the federal rule tolling a statute of limitations during pendency of a case in federal court and for 30 days thereafter is applicable only when there is no state law providing a longer tolling period. This is the only reasonable reading of the phrase, "unless state law provides for a longer tolling period". § 1367(d).

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6. This includes the language which requires voluntary dismissal of claims to make the subsection applicable in the first place. *See* Argument I, *supra*, pp. 5 and 6.

7. Six months in this case. NMSA 1978, § 37-1-14.

Contrary to Petitioners' argument, states are not placed in absolute control of the federal law. Rather, Congress intended the federal statute to fill a void left by states that have not provided a tolling period for voluntarily-dismissed federal court cases. Congress created only a bare minimum tolling period. Where, as in this case, the state has a tolling period longer than 30 days, Congress has reasonably deferred to the statute that is more beneficial to the dismissed party. This kind of deference is proper and recognized. For example, Congress has deferred to state law by setting a jurisdictional threshold for diversity of jurisdiction cases, so that cases below a set value must be handled in state courts. 28 U.S.C. § 1332.

Still looking at the plain meaning of the statute, it becomes clear that if a state's tolling statute provides a longer period than § 1367(d), then the entirety of the state statute, and its interpretive law, govern the situation. Thus, rather than merely extending the time to file, the deference to state law includes application of the entire state statute and its interpretation by that state's courts. Any other reading would lead to absurd and wholly inconsistent results, such as that Petitioners are forced to advocate under their theory:

> Therefore [sic] when a plaintiff refiles his claims within 30 days after dismissal, the applicable statutes of limitation are tolled by § 1367(d), regardless of the existence or applicability of a state tolling provision.

This type of argument places the cart before the horse, and would effectively reverse Congress' intent in enacting § 1367(d) in the first place.

The New Mexico Court of Appeals correctly determined that because the state tolling statute, NMSA 1978, § 37-1-14, has a longer tolling period than the federal statute, the state statute – the entire state statute – applies. Under the state statute, Petitioners' claims are time-barred if they were negligent in prosecuting them. The Court of Appeals correctly found that Petitioners were negligent in prosecuting their case. Pet., Appendix A. The State Supreme Court denied certiorari. Pet., Appendix D. Petitioners have not challenged that finding here. The New Mexico Court of Appeals' decision is, therefore, the law of this case.

CONCLUSION

Petitioners' imaginative interpretation of 28 U.S.C. § 1367 fails because they cannot meet the prerequisites necessary to bring their case within its terms, and because the interpretation they attempt to apply is contrary to the plain meaning of the statute. The New Mexico Court of Appeals correctly affirmed dismissal of their Complaint under New Mexico law.

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No. 01-1603

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Supreme Court of the United States

ROBERT A. LEVY and PHYLLIS B. LEVY,

Petitioners,

vs.

SWIFT TRANSPORTATION COMPANY
(Sparks, Nevada), et al.,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New Mexico

REPLY TO BRIEF IN OPPOSITION

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QUESTION PRESENTED

In a case dismissed because of the running of the statute of limitations, may a State tolling provision which is inapplicable on the given facts nevertheless prevent a litigant from relying upon the federal tolling provision 28 U.S.C. §1367(d), thereby nullifying the federal statute?

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Other Authority Cited:

Practice Commentary to 28 U.S.C. §1367, by David D. Siegel 2,4

REPLY TO BRIEF IN OPPOSITION

Respondents' Opposition to the Levys' Petition rests on three contentions, none of which is valid:

I. That the U.S. District Court did not have original jurisdiction over *Levy I* and *Levy II* (Opp., pp.3-5);

II. That §1367(d) applies only to claims that were dismissed voluntarily (Opp., p.5); and

III. That §1367(d) is inapplicable because State law provides for a longer tolling period (Opp., pp.6-9) (Respondents' answer to the Question Presented).

I.

THE FEDERAL COURT HAD ORIGINAL JURISDICTION

Levy I is not an issue in this proceeding.[1] As for *Levy II*, not only did the U.S. District Court have original jurisdiction, it had exclusive jurisdiction, for the federal claims were brought under the Federal Tort Claims Act, under which the federal courts have exclusive jurisdiction. When the federal claims were dismissed due to the running of the statute of limitations, the court declined jurisdiction over the remaining non-federal claims. It is just such claims that §1367(d) was enacted to cover, §1367(c)(3). See Practice Commentary, "the 1990 Adoption of 28 USC §1367, Codifying Supplemental

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[1]Questions relating to *Levy I* and other matters were not addressed by the Memorandum Opinion of the Court of Appeal of New Mexico (App. A at 8a-9a).

Jurisdiction," by David D. Siegel, 28 U.S.C. §1367, p. 829,836-7).

II.

APPLICATION OF §1367(d) IS NOT LIMITED TO VOLUNTARILY DISMISSED CLAIMS

The provision in the statute for claims that are voluntarily dismissed refers to a situation where the federal court declines jurisdiction over one or more claims in the lawsuit but retains jurisdiction of others. In such a situation, to avoid having to prosecute two lawsuits, the plaintiff is given the opportunity to voluntarily dismiss the remaining claims so that the entire lawsuit can be refiled as a single action. §1367(d) provides that, in addition to the claims dismissed by the court, such voluntarily dismissed claims are **also** covered by the tolling provision. See Siegel *(supra),* at 837. Such a situation did not arise in *Levy II* because Judge Hansen dismissed all of the claims, leaving none to be voluntarily dismissed.

Respondents' notion that §1367(d) somehow applies only to the voluntarily dismissed claims amounts to a complete misreading of the intent of the statute and is totally unsupported by authority. These Respondents appear to be the only parties to have ever even urged such an argument. See for example *Bajorat v. Columbia-Breckenridge Dev. Corp.,* 944 F. Supp. 1371, 1383 (N.D.Ill 1996), holding as a matter of course that claims dismissed by the court are covered by §1367(d).

III.

RESPONDENTS' ANSWER TO THE QUESTION PRESENTED IS INCORRECT

The last antecedent rule, the plain meaning test, and the weight of authority, all support Petitioners' interpretation of the duration clause in §1367(d). Respondents' construction is supported by nothing other than bare assertion. Not even their cited cases support their contention.

Respondents cannot evade the significance of the last antecedent rule by glossing over it, since it provides an unequivocal answer to the basic question, namely, what is the significance of the duration clause, "unless state law provides for a longer tolling period"? Does it mean, as Respondents contend, that the statute itself is inapplicable when state law provides for a longer tolling period, or does it mean only, as Petitioners contend, that the tolling period is longer if state law so provides, thereby giving the litigant at least 30 days to refile? The last antecedent rule answers the question unequivocally in favor of Petitioners' contention.

The plain meaning of 1367(d) is that a litigant has at least 30 days to refile after his case is dismissed. Such construction is consistent with the dicta quoted in the cases cited by Respondents.[2]

As for authority, see Siegel, at 836, "Subdivision (d) answers this dilemma by assuring that the claim shall have at least a 30-day period for state action after it is dismissed by the federal court" (Emphasis added).

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[2]The cases themselves are irrelevant to the issues herein.

Respondents assert that Congress has "reasonably deferred to the statute that is more beneficial to the dismissed party." However, if said statute is inapplicable to the dismissed party, it is hardly more beneficial.[3]

Application of standard rules of statutory construction and the weight of authority reach a different result as to the "plain meaning", namely that the statute is intended to give the dismissed party at least 30 days to refile, regardless of the state provision. After that, the state statute can be invoked, but for the first 30 days, the federal statute protects the dismissed party from the "fine print" of the state statute, which takes away with one hand what it gives with the other.

Moreover, Respondents' construction does in fact give States control of the federal law, as explained in the Petition, with examples from Georgia and California (Pet. 7-8) which Respondents ignored in their Opposition, and in this case, where the State of New Mexico made a new interpretation of its tolling statute in *Barbeau v. Hoppenrath*, 33 P 3d 675 (N.M.App. 2001) (Pet., App. A, 6a), based on which the Court of Appeals affirmed the dismissal of Petitioners' Complaint. Their contention implies that Congress intended to allow the states to nullify §1367(d) whenever they want to. No authority exists that would support such an absurd construction. Paraphrasing the Calendar Notice of the Court of Appeals (Pet.,fnt. 3, p.7), if Respondents wished to make such an argument, they should have directed the Court to some authority in support. They did not and could not.

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[3]Respondents' analogy to the jurisdictional threshold for diversity cases is also misplaced (Opp. p.8); Congress has not "deferred to state law"; it has merely deferred small cases to state courts.

CONCLUSION

The issues are joined. Petitioners and Respondents have given opposing answers to the Question Presented. Petitioners believe that the construction of an important federal statute must be resolved by this Court. Only then will litigants know where they stand when they invoke the provisions of the supplemental jurisdiction statute, since the lower court decisions in this case are unpublished and have no precedential value.

Petitioners respectfully request that their Petition for Writ of Certiorari in this matter be granted, so that these important issues may be given a definitive resolution.

Respectfully submitted,

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